IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/07/2003

CORAM

THE HON'BLE MR.JUSTICE S.R. SINGHARAVELU

SECOND APPEAL NO. 1769 OF 1992

Tayub Khan alias Tayub Sultan .... Appellant

-Vs-

1. Hairunnissa Beevi
2. Zainul Arab Begum
3. Samsiya Begum
4. Hajee Mohamed Zackariya .... Respondents

Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree in A.S.No.28 of 1990 on the file of District Judge, Ramanad reversing the judgment and decree dated 17.1.90 passed in O.S.No.8 of 1986 on the file of District Judge, Ramanad

!For appellant : Mr.P.M. Jummakhan
Mr.P.M. Prem Nazirkhan

^For respondents 1 & 2: Mr.M.V. Venkataseshan

:JUDGMENT

The plaintiff in O.S.No.8/86 on the file of District Munsif, Ramnad, whose suit for partition was on reversal of the judgment and decree of the trial court, was dismissed in the first appellate Court, against which the Second appeal was preferred.

2. The averments found in the plaint are as follows:
The suit property belonged to one Nalla Meera Ravoothar, from whom his second wife Kadar Beevi purchased it on 23.8.1915 and was in enjoyment thereof. Her only son Varusai Mohammed predeceased her. Kadar Beevi also died in 1949. The issues of Varusai Mohammed are Tayub Khan, the plaintiff, Hajee Mohamed Zackariya, the fourth defendant and one Syed Mohammed, whose wife was the first defendant and children are second and third defendants. After the death of Kadar Beevi, Syed Mohammed and the fourth defendant were commonly in enjoyment of the suit property and assessment was also made only in the name of brothers. Thus, the plaintiff is entitled to one fourth share, which is equivalent to 48/144 share. As Syed Mohammed died, his share of 48/1 44 would devolve on the second and third defendants jointly entitled to

32/144; the first defendant entitling to 6/144 share and the plaintiff and the fourth defendant each entitling to 5/144, thus making the plaintiff in total entitling to 53/144. The plaintiff issued a notice on 6.1.86 and defendants 1 to 3 sent a reply on 13.1.1986 containing false averments. Hence the suit was filed.

3. The fourth defendant has filed a written statement adopting the contentions made in the plaint.

4. The defendants 1 and 2 have filed the written statement, in which the following averments are made:
There were two husbands for Kadar Beevi and the latter never purchased the suit property under the sale deed dated 23.8.1915. Kadar Beevi was not entitled to suit property and it is not true to say that Plaintiff, Zackaria and Syed Mohammed succeeded her property. The suit property belonged to Naina Mohammed. S/o Fakir Gani Ravoothar. He had sold the same to Fakir Niana Mohammed Ravoothar S/o Niana Mohammed Aliyar. The said Fakir Niana Mohammed Ravoothar had sold it on 24.8 .1913 to his elder brother Pitchai Thambi, from whom Syed Mohammed, the husband of the first defendant had independently purchased it orally and was in enjoyment thereof by constructing a house and making assessment in his name. Syed Mohammed had, in turn, executed a settlement deed in favour of the first defendant, who herself gifted it to her daughter, the second defendant. They have also prescribed title by prescription.

5. On the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff was entitled to 53/144th share?
2. Whether the suit property originally belonged to Nalla Meera Ravoothar?
3. Whether the valuation of the suit property and the court fee was rightly made?
4. Whether the plaintiff was in joint possession?
5. Whether the suit property belongs to the first and second defendant?
6. Whether the defendants acquired right by prescription?

6. The plaintiff was examined as P.W.1 besides one Kamaludeen and Exs.A.1 to A.8 were marked. The first defendant and Varusai Niana Mohammed were respectively examined as D.W.1 and D.W.2. Exs.B.1 to B.29 were marked.

7. On consideration of the evidence available, the trial Judge has decreed the suit and the first appellate Judge has dismissed the suit, against which the plaintiff had preferred the Second Appeal.

8. At the time of admission, the following substantial question of law was framed:
Whether the judgment and decree of the Lower Appellate Court holding that the title of the defendants/respondents 1 and 2 is perfected by adverse possession are valid and sustainable in law?

9. The suit property is a house of 90' x 27 +' bearing Door No.5/10 5

and situate at Siddar Kottai at Ramnad District. Admittedly the plaintiff, the fourth defendant and one Syed Mohammed, the husband of the first defendant and father of defendants 2 and 3 are brothers and were born to one Varusai Mohammed, who as the only son predeceased his mother Kadar Beevi and the latter herself expired in 1949. She was said to be the second wife of Nalla Meera Ravoothar, to whom the suit property was said to belong. He had executed a registered sale deed under Ex.A.1 dated 23.8.1915 in respect of suit property in favour of Kadar Beevi. It is under this document, plaintiff claims right of 48/144th share along with the fourth defendant and Syed Mohammed. He further contended that on the death of Syed Mohammed, his share of 48/144 will devolve upon plaintiff to the extent of 5/144 share and thus, the plaintiff sued for 53/144th share.

10. True, it is that he sent a notice on 6.1.1986 through the original of Ex.A.2, which was acknowledged by defendants 1 to 3 under Exs. A.3 to A.5. The reply notice of defendants 1 to 3 was marked as Ex.A.6. Even in that notice, it was denied that Kadar Beevi was never entitled to suit property and that it was self acquisition of Syed Mohammed, husband of the first defendant. It was also contended that there was never any common enjoyment much less with plaintiff.

11. Defendants contended that the suit property originally belonged to one Naina Mohammed. S/o Fakir Gani Ravoothar, from whom, Fakir Nainar Mohammed, father of Nalla Meera Ravoother had purchased it. This Fakir Nainar Mohammed is none but the father-in-law of Kadar Beevi, to whom title was allegedly vested with by the plaintiff in the suit property, Fakir Nainar Mohammed had purchased it from Nainar Mohammed under Ex.B.10 dated 23.5.1913, two years earlier than Ex.A.1, the document relied on by plaintiff and had sold the same under Ex.B.9 dated 24.8.1913 to the vendor's elder brother Pitchai Thambi, from whom Syed Mohammed, husband of the plaintiff was said to have purchased it orally. It is subsequently when Dhal Hadi, Son of Pichai Thami claimed rights in the suit property as against Syed Mohammed, there was a panchayat in the Jamath, the erstwhile President of the same was D.W.2 and who among others have contended affirmatively about the said Panchayat and further spoken to the fact that as per the advice of the Zamath leaders, the said Dhal Hadi had chosen to execute a release deed in favour of Syed Mohammed on 19.7.72 under Ex.B.29. That document has the seal of Honorary Secretary of Muslim Dharma Paripalana Sabha of Ramnad District. That deals with the suit property.

12. Thus, on the face of production of Ex.B.10 23.5.1913, we are able to see that even much earlier to Ex.A.1, the owner of the suit property was only Fakir Nainar Mohammed. The pleading that Fakir Nainar Mohammed was the father-in-law of Kadar Beevi has not been specifically repudiated even in the course of evidence. Thus, as against the Nalla Meera Ravoothar, the vendor under Ex.A.1 dated 23.8.1915 it was his father Fakir Nainar Mohammed, who was having title thereunder by purchasing the same under Ex.B.10 dated 23.5.1913 from one Nainar Mohammed S/o Fakir Gani Mohammed. Fakir Nainar Mohammed, the vendee under Ex.B.10 never allowed the property to be succeeded by his son Nalla Meera Ravoothar, the husband of Kadar Beevi, but had dealt under Ex.B.9 dated 24.8.1913 in selling the same to his elder brother Pichai Thambi, who by

then lived at Malaysia. From this what is very much evident is that Nalla Meera Ravoothar had no title at all in suit property so as to sell the same to Kadar Beevi under Ex.A.1. Therefore, neither the plaintiff nor any one of his brothers or their father Varusai Mohammed could ever have any right over the suit property, by right of succession, as claimed by plaintiff.

13. The fact that the suit house was developed by Syed Mohammed is evident not only from the absence of such house in any of the documents of the plaintiff, but also the fact that it was found under Ex.B.2 9 the release deed executed to Syed Mohammed. Whether Syed Mohammed had any title is to be seen.

14. While the plaintiff claims title as heir of Kadar Beevi, to whom it was alleged that the suit property belonged to, by right of purchase under Ex.A.1 from Nalla Meera Ravoothar, Syed Mohammed, husband of the first defendant set up title upon a different individual viz., Fakir Nainar Mohammed, the father of Nalla Meera Ravoothar and upon the predecessor in title found under Ex.B.10 as Nainar Mohammed. Thus, while plaintiff and the fourth defendant claimed to have been in enjoyment of the suit property as heirs of Kadar Beevi, Syed Mohammed, impliedly denying the title of Kadar Beevi and expressly setting upon the title on Fakir Nainar Mohammed, had dealt with the property. It is true that there cannot be valid oral sale in favour of Syed Mohammed by Pichai Thambi, who might have derived title under Ex.B.9 from Fakir Nainar Mohammed. This is so, because transfer of tangible right over a valuable property could only be done by a registered document. Thus, the alleged oral sale in favour of Syed Mohammed is, in law, not accepted. Any way he has got release deed under Ex.B.29 dated 19.7.72 from Dhal Hadi, son of Pichai Thambi. There was a panchayat by the Zamath in and by which the possession of the suit property by Syed Mohammed has been recognised. True, it is that the release deed cannot create title but only feed title.

15. In this case, Ex.B.29 release deed has got some bearing because it is in favour of Syed Mohammed, who was already in possession of suit property under the guise that he had purchased it orally from Pichai Thambi. Truthfulness of Ex.B.29 cannot be questioned very much because it has approval of Honorary Secretary of Muslim Dharma Paripalana Sabha of Ramnad District. The society of Zamath had also approved the possession of Syed Mohammed and resolved the issues between the later and Dhal Kadi. Anyway, we are not saying that Ex.B.29 conveyed any right over the suit property to Syed Mohammed.

16. But having a strong belief that the suit property had orally been purchased from Pichai Thambi and since the dispute was resolved by no less a person than the society of Zamath, whose verdict among the Muslims is unimpeachable, Syed Mohammed started his possession, much earlier than 19.7.72, the date of release de ed. Having seen all these involvements of Zamath and the belief that he had derived title from Pichai Thambi, whose title was proved under Ex.B.9 and whose predecessors in interest of title was fixed under Ex.B.10, Syed Mohammed had every reason to disassociate the suit property from Kadar Beevi. When the other two brothers viz., plaintiff and the fourth defendant were under the false hope that Kadar Beevi alone had title from whom they derived by way of succession, Syed Mohamm ed rightly

thought that he has got title from the purchaser under Ex.B.9. We have also found that the purchaser under Ex.B.9 and the predecessor in interest were shown to have been entitled to the suit property as against Nalla Meera Ravoothar,the vendor of Kadar Beevi under Ex.A.1, who could have no title at all against his father Fakir Nainar Mohammed, who sold the same to Pichai Thambi under Ex.B.9.

17. It is therefore, we find that Syed Mohammed disassociated himself from plaintiff and the fourth defendant, disbelieving that they could derive any title from Kadar Beevi and began to enjoy the property. His possession, is, therefore to be construed as that against Kadar Beevi or any body claiming under her including the plaintiff and the fourth defendant. Thus it becomes adverse.

18. The learned counsel for the appellant/plaintiff contended that possession of one co-sharer is possession all and that as the plaintiff, the fourth defendant and Syed Mohammed are brothers, any acquisition by any one will have to be treated as property of tenants in common.

19. Reliance was placed in the case of Bhagbhari vs Khatun (A.I.R. 1921 SIND 177), wherein the following was observed:
"Where on the death of a Muhammedan his son as the only surviving male member of his family assumes the management of the estate the natural presumption is that he deals with the land as manager or agent for his co-sharers(co-heirs) and on his own behalf. 1 S L.R.133; 2 S.L. R 43
Possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former. 31 Cal. 970 and 35 Cal 961 Foll".

20. Reliance was placed in the case of Md. Kaliba Rowther vs Muhammad Abdullah Rowther (A.I.R. 1963 Madras 84 (V 50 C 29), wherein the following observation was made:
"Mere non-participation in the receipts from immovable property or mere inaction in respect of it for any length of time on the part of one or more of the co-sharers is not regarded as amounting to ouster or as investing the possession in the hands of one of the co-sharers with an adverse character". Thus it was argued that non participation of one co-sharer in the enjoyment of property will not cloth adverse character into the possession of other co-sharers.

21. As against the judgment of the Single Bench in the case of Kannappan vs Pargunan and 9 others (2000 II CTC 219), reliance was placed by the respondents/defendants in the case of K. Krishnan and another vs S. Mari Naicker and another (2003 (1) CTC 290) , wherein the following was observed:
"I am in agreement with the view expressed by K.P. Sivasubramaniam, J in Thangamani vs Santhiagu, 2000 (3) M.L.J., 589 that it was not necessary that the adverse possession should be brought to the knowledge of the person against whom it is claimed and that it was sufficient that possession should be open and without any concealment so that the person against whom the time was running was aware of what was happening. The other decision cited by the

learned counsel for the respondent is Sadasiva Gounder and another vs Purushothaman, 2000 (3) M. L.J., 785 in which K. Sampath,J has held that 'animus' in the legal parlance would mean mind, design, will, intention, disposition and to claim with regard to possession, the term is animus possidendi, which means the intention of possession and the person claiming adverse possession must intend in his mind to possess a property as his own and it does not mean that he must be conscious that the property belongs to somebody else and all that is required by the term "animus" in the context of adverse possession is that the person must have intention to possess the property as his own and I agree with the above view of the learned Judge".

22. Thus the possession of Syed Mohammed attributing title upon a different person other than Kadar Beevi under whom the plaintiff and the fourth defendant were claiming, will have to be considered only adverse to the latter. If only Syed Mohammed believed that Kadar Beevi had title, he might have thought of plaintiff and the fourth defendant deriving title therefrom. It is in that context only he could believe the title of plaintiff and the fourth defendant and start possession adverse to them. But here we have found that Kadar Beevi had no title as against Fakir Nainar Mohammed. While plaintiff and the fourth defendant were under the wrong belief that they derived title from Kadar Beevi, acceptance of their title by Syed Mohammed could not at all be a normal course of expectance. Therefore, the possession of Syed Mohammed cannot be said to be not adverse. It is in this context the principle laid down in the case of K. Krishnan and another vs S. Mari Naicker and another (2003 (1)CTC 290) is applicable than in the case of Kannappan vs Pargunan and 9 others (2000 II CTC 219).

23. When once Syed Mohammed started possession rightly under the impression that neither the plaintiff nor the fourth defendant had any right on it, then the question of co-sharer is out of picture. As per our earlier finding also, plaintiff and the fourth defendant could claim nothing under Kadar Beevi. Therefore, as they are not cosharers the principle laid down in the case of Md. Kaliba Rowther vs Muhammad Abdullah Rowther (A.I.R. 1963 Madras 84 (V 50 C 29), cannot be made applicable here.

24. It was held in the case of Darshan Singh and Ors vs Gujjar Singh (Dead) by Lrs and Ors (2002(1) CTC 240, where, it was held as follows: "In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possessed the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other cosharers and mutation in the revenue record in the name of one cosharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied".

25. we have already found that plaintiff and the fourth defendants are not co-sharers in as much as what Syed Mohammed claims, is not under Kadar Beevi, under whom plaintiff and the fourth defendant claims and it was a different person. Since there was no co-sharers it is enough on the part of Syed Mohammed to prove his statutory possession.

26. As mentioned earlier, it is in denial of title of Kadar Beevi and

the plaintiff and the fourth defendant, who claim under the former, Syed Mohammed establishing title upon a different individual began to enjoy the property. Therefore, the element of hostility as mentioned in para 8 of the judgment in the case of Ponnaiyan vs Munian (died) and others (1995-1 L.W 680) is very much available. What was observed in the above case law is as follows:

"There is no statutory definition of adverse possession. Adverse possession refers to actual and exclusive possession coupled with intention to hold as owner. Adverse possession becomes hostile to the rightful owner, when a person openly and continuously possesses a land under a claim of right adverse to the title of the true owner for the statutory period. Adverse possession means a hostile possession which is express or implied in denial of the title of the true owner. Such possession must be actual and exclusive, under a claim of right, adequate in continuity in publicity and in extent so as to show that it is adverse to the true owner. Such possession, in denial of title of the true owner must be peaceful, open and continuous. Mere possession without a claim of right for over a long time is not sufficient to create adverse possession. A mere user of property cannot be taken as a definite assertion of proprietary right, there must be some definite quality in the possession, before it can be called adverse and there must be some fact of unequivocal character which may put the owner on guard. There can be no adverse possession if the person claims does not know that he is enjoying somebody else's land. He must have the intention of using the property adversely against the another having an interest in it. To summarise it, a person by holding possession of the property for the statutory period can acquire title only when his possession is 1) under a claim of tile 2)hostile to the true owner and 3)actual, open, uninterrupted, continuous and exclusive".

27. The question now is as to whether Syed Mohammed can be construed as having title when once it was found that oral sale in his favour by Pichai Thambi was not in accordance with law. In this connection what is to be looked is that the possession might have commenced as wrong in as much as the oral sale failed to carry or convey anything. But the possession maintained against the so called rightful owner viz., the plaintiff and the fourth defendant, who all along believed that they have inherited the suit property from Kadar Beevi, whom they believed as the original owner may definitely have the character of adverse possession. In this connection, the citation in the case of Nagarajan vs Rajammal Aiyar and seven others (1999 (1) CTC 428, wherein the following observation was found:

"Adverse possession is the exception in the recognition by law of acquisition of title only through lawful means. Adverse possession implies that possession commenced in wrong and (b) maintained against right Corpus Juris Secundum ...."

28. It is not also as if that to the exclusion of Syed Mohammed, the plaintiff and the fourth defendant ever enjoyed the suit house. It was from the year 1972,. We could trace the possibility of Syed Mohammed is of the year 1986. There is abundant evidence to show the possession of Syed Mohammed along with the first defendant, to whom in 1974, Ex.B.18 was executed and there was a document by the first defendant to second defendant under Ex.B.26 in 1983. Exs.B.5 to B.8, B.11 to B.17, B.19 to B.25 are also the kist

receipts filed in the interim period. As mentioned earlier, non-exclusion of possession of Syed Mohammed or the defendants 1 to3 had ever been the case. Thus, the defendants 1 to 3 acquired right by prescription. So, plaintiff is to be non-suited.

29. In the result, the Second Appeal is dismissed. No costs.

Index:Yes
Web site:Yes

To

1. The District Judge, Ramanad
2. The District Judge, Ramanad